Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Cross-Petitioner,

v.

HAROLD E. STEELE, DON PETERSON, REV. DAVID MAYNARD, HARMON WRAY, REV. TOM BAKER, JR., INDUSTRIAL DEVELOPMENT BOARD OF METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, DAVID LIPSCOMB UNIVERSITY, and NATIONSBANK AND NATIONSBANK/TENNESSEE,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether religious affiliated educational facilities whose construction or renovation were financed through tax exempt industrial revenue bonds which the local government grants in a neutral manner, expends no money and merely acts as a conduit for private investor financing, may be used for religious purposes.

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Cross-Petitioner, Metropolitan Government of Nashville and Davidson County, Tennessee, respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 301 F.3d 401 (6th Cir. 2002) and is reprinted in Appendix A to Petitioners' petition for writ of certiorari [hereinafter, "Pet. App. A."] at pp. 1a-79a. The Opinion of the District Court is reported in *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 117 F. Supp. 2d 693 (M.D. Tenn. 2000) and is reprinted in Appendix B [hereafter, "Pet. App. B. at pp. 80a-168a"].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its decision on August 14, 2002. [Pet. App. A. 78a-79a] Petitioners' writ of certiorari was placed on the docket on November 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C.

§ 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioners' petition for writ of certiorari.

STATEMENT OF THE CASE

Cross-Petitioner, Metropolitan Government of Nashville and Davidson County, Tennessee is a combined city/county government. The original Petitioners Harold Steele, Don Peterson, Rev. David Maynard, Harmon Wray, and Tom Baker Jr. [hereinafter, "Petitioners"] are state and local taxpayers residing in Nashville, Tennessee who contend that the issuance of tax exempt revenue bonds by the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County [hereinafter, "the Board"] for David Lipscomb University [hereinafter, "Lipscomb"] provides an impermissible direct economic benefit to a pervasively sectarian institution in violation of the Establishment Clause.

During the early 1990's, Lipscomb undertook a major redevelopment project on its campus. To finance the project, Lipscomb sought a $15 million, low-interest loan from the Board. The Board approved the loan and financed it by issuing tax exempt industrial development bonds worth $15 million. Its former Mayor, Mayor Bill Boner, granted the approval by the governmental unit having jurisdiction of the area where the facilities to be financed by the bond proceeds would be located. [Pet. App. A. 8a]. The loan from the proceeds of the bonds was used in part to construct and equip a new library, to renovate and convert the old library into administrative offices, and to construct a new intramural athletics building ("or student activities center"), four new

tennis courts, a new baseball stadium, an intramural field, and an addition to the school's Business Center. [Pet. App. B. 83a-84a].

The bonds are typical of industrial revenue bonds that are commonly issued for educational or industrial purposes. The bonds were issued by the Board pursuant to its authority under state law to issue bonds for the financing of projects for "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." Tenn. Code Ann. § 7-53-101(11)(A)(vii) (1990 Supp.).

Because the bonds were issued as education revenue bonds by the Board, the income produced by the bonds is exempt from state taxation. In addition, the bonds were approved by the Metropolitan Government of Nashville and Davidson County's [hereinafter, "Metropolitan Government"] Mayor under the provisions of 26 U.S.C. § 103 (1994), making the interest on the bonds federally tax exempt. [Pet. App. A. 4a-8a]. Consequently, the bonds carried a lower interest rate than conventional financing, and Lipscomb realized the financial benefit through the resulting lower interest rate on its loan from the Board. [App. B. 84a].

Although the Board is an instrumentality of the Metropolitan Government, the bonds do not constitute an indebtedness of either the Board or the Metropolitan Government. [App. B. 86a]. Neither the Board nor the Metropolitan Government can be held liable to pay any portion of the principal or interest on the bonds or any costs incident to their issuance.

> The municipality shall not in any event be liable for the payment of the principal of or interest on any bonds of the corporation, or for the performance of any pledge, mortgage, obligation or agreement of any kind whatsoever which may be undertaken by the corporation, and none of the bonds of the corporation or any of its agreements or obligations shall be construed to constitute an indebtedness of the municipality within the meaning of any constitutional or statutory provision whatsoever.

Tenn. Code Ann. § 7-53-306 (1985). No state or local government tax revenues have been or will be spent as a result of the issuance of the bonds. [Pet. App. B. 86a].

The Loan Agreement between Lipscomb University and the Board contains a restrictive use provision. Section 5.3 on "Special Covenants" states:

> (s) The Borrower will not use the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.

[Pet. App. A, p. 6a].

Petitioners filed suit in the United States District Court for the Middle District of Tennessee on May 30, 1991, challenging the validity of the Board's action in issuing tax exempt revenue bonds for the benefit of Lipscomb.

In response to Lipscomb's first motion for summary judgment, the judge originally assigned to this case found that, even if no tax money is spent, taxpayer status is proper grounds for an Establishment Clause challenge to policies that affect the city's general revenue fund. Summary judgment was denied on those grounds and, on interlocutory appeal, the Sixth Circuit Court of Appeals upheld the ruling on standing. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 39 F.3d 1182 (6th Cir. 1994) (unpublished table decision), *cert. denied*, 515 U.S. 1121, 115 S. Ct. 2275, 132 L. Ed. 2d 279 (1995).

Lipscomb submitted a renewed motion for summary judgment on December 15, 1995, asserting that the "tax exempt" status the bonds derived from the Board could not have harmed the plaintiffs because the bonds would not have fallen under the Hall Income Tax statute anyway. Tenn. Code Ann. § 67-2-102 (1985). Because the bonds would mature in less than six months, the university argued, they were demand instruments, which are not taxable under the Hall Income Tax statute. The question of whether the bonds would have fallen under the Hall Income Tax statute if they had not been issued as tax-exempt bonds was certified to the Tennessee Supreme Court. The Tennessee Supreme Court ruled that, under the plain meaning of the law, bonds are not demand instruments and, therefore, are taxable. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 950 S.W.2d 345 (1997).

Lipscomb filed its third motion for summary judgment, asserting that its receipt of tax exempt bonds for its facilities expansion project was not a violation of the Establishment Clause, nor did it have the primary effect of advancing religion. [Pet. App. B, 87a]. The Metropolitan Government also moved for summary judgment. During oral argument

on the motions, the trial court requested that the Petitioners file a motion for summary judgment. [Pet. App. B. 87a]. Petitioners filed a motion for summary judgment, asserting that Lipscomb was so pervasively sectarian that a substantial portion of its function was subsumed in its religious mission and that the $15 million loan funded by tax revenue bonds had the impermissible effect of promoting religion as a matter of law.

On October 24, 2000, the trial court entered a memorandum and order granting Petitioners' cross-motion for summary judgment and denying the Metropolitan Government's and Lipscomb's respective motions for summary judgment. *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 117 F. Supp. 2d 693 (M.D. Tenn. 2000). [Pet. App. B]. The trial court also determined that the low interest loan of $15 million originated by the Board at Lipscomb's request constituted a direct economic benefit because it advanced Lipscomb's sectarian mission. The trial court issued a permanent injunction enjoining the Board and the Metropolitan Government from using any additional tax exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. The trial court awarded Petitioners nominal damages in the amount of $1.00 each and awarded Petitioners' attorneys' fees.

The Metropolitan Government also asked for a stay of the permanent injunction issued by the district court enjoining the Board and the Metropolitan Government from issuing any additional tax-exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. On July 13, 2001, the district court denied the Metropolitan Government's motion for a stay pending appeal. Thereafter, in a motion filed on August 13, 2001, the Metropolitan

Government appealed the district court's denial of its motion for a stay pending appeal. In an order entered on September 25, 2001, this Court denied the motion for a stay pending appeal.

On the merits of the appeal, the Sixth Circuit Court of Appeals reversed the trial court, and granted summary judgment to Lipscomb and the Metropolitan Government. *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 301 F.3d 408 (6th Cir. 2002) [Pet. App. A]. The Court of Appeals held that the sectarian status of Lipscomb was not a relevant consideration in its Establishment Clause analysis. [Pet. App. A. 29a.]. The majority opinion further held that the $15 million low interest loan originated by the Board at Lipscomb's request was indirect aid and was analogous to an indirect financial benefit conferred by a religiously neutral tax exemption or charitable deduction. [Pet. App. A. 29a.].

REASONS FOR GRANTING THE PETITION

Cross-Petitioner requests the Court to grant it a conditional writ of certiorari in this matter to address the important Establishment Clause and Free Exercise Clause issue presented. Should the Court grant Petitioners' writ of certiorari in this case, it will be asked to determine whether the tax exempt bond financing granted Lipscomb University was direct or indirect aid. Assuming the court affirms the Sixth Circuit Court of Appeals and holds that the aid is in fact indirect, then the Metropolitan Government should not be required to monitor and prohibit Lipscomb University from using the financed facilities for religious purposes.

This Court has historically recognized the constitutional distinction between governmental subsidies and tax exemptions that are granted to religious affiliated institutions.

Waltz v. Tax Commissioner of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). The distinction between direct aid and indirect aid determines how the aid may be used by the religious affiliated school. As the Court in *Waltz* recognized:

> The court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.

Id. 397 U.S. at 668-669, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970).

The Metropolitan Government accepts that direct aid in the form of grants or subsidies to construct or renovate facilities at religious affiliated universities carries with it the concurrent duty to monitor and restrict the use of such facilities to secular purposes. *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) rehearing denied, 404 U.S. 876, 92 S. Ct. 24, 30 L. Ed. 2d 123 (1971). Not only are the restrictions required, but they must be enforced for the life of the building.

On the other hand, there are no restrictions placed on how religious affiliated universities spend the money that they would have had to pay in taxes, but for the tax exemptions they enjoy. *Waltz v. Tax Commissioner of City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). Tax exemptions are an indirect benefit to the religious affiliated university and involve no subsidy of taxpayer money. While it would be simple enough to calculate the amount of indirect benefit granted by such tax exemptions, it is not necessary because no restrictions are placed on the savings the religious affiliated universities enjoy.

While a majority of this Court recently rejected the legal proposition that direct aid to religious affiliated schools may be used for both religious and non-religious purposes even if the aid is granted to all schools using neutral criteria, that is not the issue the Metropolitan Government requests this Court to address. *Mitchell v. Helms*, 530 U.S. 793, 893-844, 120 S. Ct. 2530, 2560, 147 L. Ed. 2d 660 (2000). The computer and other equipment in *Mitchell* were purchased with taxpayers' dollars. It clearly was direct aid. Although the plurality in *Mitchell* rejected the inevitability of the "pervasively sectarian" test and allowed "pervasively sectarian" schools to be given a chance to restrict the use of direct aid to secular purposes, ultimately *Mitchell* is a direct aid case. A majority of this Court has continued to maintain the distinction between direct and indirect aid, regardless of whether it is offered to all applicants based upon neutral criteria. The actual diversion of direct government aid to a school's religious mission is currently prohibited. *Id.* 530 U.S. 793, 837-838, 120 S. Ct. 2530, 2556-2557, 147 L. Ed. 2d 660 (2000).

There is no dispute of the facts in this matter. The Metropolitan Government requests the Court to determine whether it must monitor and restrict Lipscomb University from using the facilities for religious purposes. Not one dime of taxpayer money is involved. The loans are approved using neutral criteria. The Sixth Circuit Court of Appeals held that the aid granted in this case was analogous to the aid granted in *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). [Pet. App. A. 29a].

Assuming that this Court agrees that this matter is analogous to *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), the Metropolitan

Government asks the Court to explicitly reverse *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973). This Court will have had to finally addressed the question left unanswered in that case – whether tax exempt bond financing is direct or indirect aid. Once the Court determines that it is indirect aid, like the aid offered in *Waltz v. Tax Commissioner of the City of New York*, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), but unlike the aid offered in *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971), then *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) ceases to serve any further purpose except to confuse Establishment Clause and Free Exercise Clause jurisprudence.

CONCLUSION

The conduit tax exempt bond financing provided Lipscomb is indirect aid to a religious affiliated university. It no more offends the Establishment Clause than does the property tax exemption Lipscomb also enjoys. Both benefits require approval by the local government. Neither one should limit how Lipscomb uses the indirect aid when neither type of aid involves a government subsidy and both aid programs are administered according to neutral criteria. To the extent that *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) continues to confuse current Establishment Clause and Free Exercise Clause jurisprudence, it should be explicitly overruled. Local governments should not have to monitor and restrict the use of indirect aid religious affiliated schools receive.

For these reasons, should the Court grant the petition for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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